

CRISIS IN THE COURTROOM: DETENTION OF ENEMY COMBATANTS

BY

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ABSTRACT

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CRISIS IN THE COURTROOM: DETENTION OF ENEMY COMBATANTS

For it is said, in line with the acosmic ethic of love, 'Resist not him that is evil with force,' for the politician the reverse proposition holds, 'thou shalt resist evil by force,' or else you are responsible for the evil winning out.

—Max Weber¹

Americans will never forget the attacks on its citizens on September 11, 2001 when terrorists hijacked commercial airliners and crashed three of them into the World Trade Center Towers and the Pentagon. Over 2,700 individuals from 115 nations died when the World Trade Center Towers fell;² 184 more died at the Pentagon.³ How the United States responds to the 9/11 terrorist attacks and the threat of terrorism throughout the world will be the deciding factor on whether these organizations and persons continue to be a serious threat not only to the United States, but to other nations throughout the world. To date, perhaps the United States' most controversial response to global terrorism is the Bush Administration's decision to hold individuals as unlawful enemy combatants at the United States Naval Base at Guantanamo Bay, Cuba.

It did not take long to discover who was behind the 9/11 attacks. In the 1980s, Usama bin Ladin had formed a network devoted to terror and subversion with a goal to unite all Muslims and establish an Islamic government in the Middle East. By the 1990s, bin Ladin was publicly proclaiming a violent anti-U.S. agenda. In 1996, bin Ladin issued a "declaration of war" against the United States and two years later he began urging his followers to kill American Soldiers. That same year, 1998, his network's World Islamic Front for Jihad Against the Jews and Crusaders declared its intention to attack Americans and their allies, including civilians. To make good his rhetoric, bin

Ladin's network supported and trained terrorists around the world to carry out his war.⁴

In 1999, the Department of State designated bin Ladin's organization, al Qaeda, a foreign terrorist organization.⁵

Prior to 9/11, bin Ladin's terrorist organization had already successfully carried-out several attacks against Americans: it had bombed the World Trade Center in New York City in 1993, the Khobar Towers in Saudi Arabia in 1996, and United States embassies in Kenya and Tanzania in 1998; it had also attacked a U.S. Navy ship, the U.S.S. Cole, in Yemen in 2000. Moreover, the United States knew that al Qaeda was in Afghanistan training thousands of would-be terrorists and planning additional attacks with the knowledge of the Taliban Government.⁶ In 1999, former President Bill Clinton declared a national emergency against the Taliban Government of Afghanistan, finding that their continued provision of safe harbor and a base of operations for al Qaeda constituted an unusual and extraordinary threat to the United States' national security and foreign policy. As a result, the United States froze all Taliban assets and prohibited trade with the Taliban.⁷ Thus, on the eve of September 11, 2001, the United States was well-aware of the threat posed by Usama bin Ladin and his al Qaeda terrorists.

After 9/11, al-Qaeda continued its terrorist attacks. As Supreme Court Justice Clarence Thomas has observed:

We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy who lurks in the shadows conspiring to reproduce the atrocities of September 11, 2001, and who has boasted of sending suicide bombers into civilian gatherings, has proudly distributed videotapes of beheadings of civilian workers, and has tortured and dismembered captured American Soldiers.⁸

With the backdrop of the atrocities committed on 9/11, the United States chose to exercise its right as a nation-state to respond to this evil with the use of military force in

self-defense. The U.S. response also included a very controversial decision by the Administration to detain alleged members of the Taliban and al Qaeda forces, and associated forces at Guantanamo Bay. This paper explores the Congressional authorization for detention of enemy combatants, as well as the Administration's implementation of the detention authorization. It then discusses the international laws of war that underpin a nation-state's right to detain enemy combatants, and details how the three branches of the U.S. Government have acted to resolve the many legal issues presented. The paper concludes by making several recommendations to modify the current system to provide greater transparency and additional protections to the detainees held at Guantanamo Bay, while continuing to ensure that U.S. national security interests are protected.

Congressional Authorization to Use Military Force

On September 18, 2001 the U.S. Congress invoked its authority under the War Powers Resolution,⁹ giving the President the authority "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks on September 11, 2001 or harbored such organizations or persons" ¹⁰ Six days after Congress passed this authorization to use military force (AUMF), the President first reported to Congress the deployment of various combat-equipped and combat support forces to a number of locations in the Central and Pacific Command area of operations.¹¹

This was not the first time, of course, that Congress had authorized the President to use military force, but this authorization was unique. It was not an authorization that limited the use of military force to a specific nation-state, such as against Great Britain

in the War of 1812, Germany in both World Wars and Japan in World War II, nor was it an authorization to use military force pursuant to a request of a nation-state to assist in their defense, as in the Vietnam conflict, or an authorization to use the U.S. military to enforce United Nations Security Council resolutions against a specified nation-state, as in the First Gulf War.¹² Congress' authorization to use force in this instance extended to *any* nation, organization, or person that the *President* determined planned, authorized, committed or aided the attacks on 9/11 or harbored such organizations or persons.

Less than one month after Congress gave him this broad authority to use military force, on October 7, 2001, President George W. Bush ordered combat action to commence in Afghanistan under his authority to conduct U.S. foreign relations as Commander-in-Chief and Chief Executive, and pursuant to the AUMF.¹³

As expected in any combat operation, upon entering Afghanistan, the United States Armed Forces began capturing individuals whom they believed were Taliban fighters, or members of al-Qaeda or associated organizations. A majority of these individuals wore no uniforms or other insignia to distinguish them from the local civilian population. The question quickly became how to determine the status of these captured individuals and what rules applied to their detention.

Detention of Unlawful Enemy Combatants

In November 2001, President Bush issued a military order on the detention, treatment, and trial of certain non-U.S. citizens in the war against terrorism.¹⁴ The military order provided that certain individuals could be detained and, when tried, could be tried for violations of the laws of war by military tribunals.¹⁵ Those individuals included any non-U.S. citizen whom the President determined was a member of al

Qaeda or who had engaged in, aided or abetted, or conspired to commit acts of international terrorism or acts in preparation therefore, or had knowingly harbored such individuals.¹⁶ Generally, international terrorism includes the use or threatened use of unlawful violence to instill fear in order to coerce or intimidate a government or a civilian population, or to influence the policy of a government, in pursuit of goals that are typically political, religious, or ideological.¹⁷

The President's order authorized the Secretary of Defense to try these detainees by military commission and if found guilty to punish them according to the penalties provided under applicable law, to include life imprisonment or death. Additionally, the President authorized the Secretary of Defense to issue orders and regulations necessary to constitute the military commissions. The order set forth certain minimum requirements for the regulations, including that any evidence could be admitted and considered by the commission if it had probative value, that is, if the evidence tended to prove whether or not the detainee had committed the crime alleged.¹⁸

As implemented by the Secretary of Defense, the military commission rules provided that the detainee must be furnished a detailed defense counsel (a military lawyer); he also had a right to the prosecution's evidence and to any exculpatory evidence, to obtain witnesses and documents, and to be present at every stage of the trial, unless he engaged in disruptive conduct (although detailed defense counsel could not be excluded from any trial proceedings).¹⁹ These latter rights, however, were subject to certain conditions. Proceedings could be closed, and the accused excluded, to protect information that was classified or protected by law or rule from unauthorized disclosure; to protect the physical safety of participants; and to protect intelligence and

law enforcement sources, methods, or activities, or other national security interests.²⁰

Moreover, the presiding officer could direct deletion of specified items of protected information from documents made available to the accused, but this information could not be admitted into evidence unless presented to the detailed defense counsel.²¹

Neither the Presidential order nor the implementing rules, however, addressed the status of these detainees under international law. Status is important in determining the standards for treatment and detention of the captured individual. The failure to immediately provide guidance and procedures for detainee processing and treatment quickly developed into one of the most difficult issues for commanders and military lawyers on the ground in Afghanistan, as they attempted to devise procedures for processing detainees and to articulate treatment standards. In the absence of definitive guidance, military lawyers advised that detainees should be treated in a manner consistent with Geneva Convention standards.²²

In February 2002, some five months after combat operations began in Afghanistan, President Bush finally settled the detainee status issue by finding that the Geneva Conventions of 1949 applied to the then-present conflict with the Taliban, but that “none of the provisions of the convention applied to the U.S. conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.”²³ Moreover, although the Geneva Conventions applied to the U.S. conflict with the Taliban, the President determined that the Taliban did not comply with Article 4 of the Third Geneva Convention; therefore, the Taliban were not entitled to prisoner of war (POW) status upon capture.²⁴ Under Article 4, to be accorded POW status, a force such as the Taliban must: (a) be commanded by

a person responsible for his subordinates; (b) have a fixed distinctive sign recognizable at a distance; (c) carry arms openly; and (d) conduct their operations in accordance with the laws and customs of war.²⁵

If the Geneva Conventions do not apply because the conflict is not one of an international character between two parties to the convention then, generally, Common Article 3 of the conventions applies to the conflict. Common Article 3 affords a baseline of treatment for persons in non-international armed conflicts who otherwise are not entitled to the protections afforded to POWs and civilians in international armed conflicts under the Geneva Conventions.²⁶ For example, Common Article 3 provides that detainees, among others, must be treated humanely and requires that they be protected against violence, including murder, cruel treatment and torture, and against outrages upon their personal dignity such as humiliating and degrading treatment. Additionally, Common Article 3 provides that detainees may only be sentenced or executed after a “judgment [is] pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.”²⁷

In his February 2002 memorandum, the President determined that Common Article 3 of the Geneva Conventions did not apply to either al Qaeda or Taliban detainees because Common Article 3 only applies to armed conflict not of an international character. Because al Qaeda was an international terrorist organization, and the United States was engaged in an international armed conflict with the Taliban, both conflicts were of an international character.²⁸

The effect of this Presidential finding in 2002 was that the Taliban and al Qaeda detainees fell completely outside the protections of the Geneva Conventions. The

Presidential determination was not without guidance, however, on detainee treatment. The President directed that “[a]s a matter of policy, the United States Armed Forces shall continue to treat the detainees humanely and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.”²⁹

Shortly after the Presidential finding that the Geneva Conventions did not apply to the Taliban or al Qaeda, on February 25, 2002, the Secretary of Defense published classified criteria for the transfer of detainees to the United States Naval Base at Guantanamo Bay, Cuba.³⁰ When initially apprehended, individuals were designated as persons under control of U.S. Forces or simply as detainees.³¹ They typically were taken to a U.S. Military forward operating base holding facility where an interrogation team determined whether the person met the Secretary of Defense criteria for detention as an enemy combatant. To be moved to the main detention facility at Bagram Airbase, the detainee had to meet the Secretary of Defense criteria; otherwise, he was released.³²

A detainee review board operated at the detention facility at Bagram to screen the detainees to determine if they should be transferred to the Guantanamo Bay detention facility. This screening team consisted of military lawyers, intelligence officers, and federal law enforcement officials. After considering all of the information available, the screening team made an assessment, which was forwarded for review to a general officer designated by the Commander, Central Command. The general officer considered the threat posed by the detainee, his seniority within the hostile forces, his possible intelligence value, any law of war violations, and other factors in making his

recommendation. Certain Department of Defense (DoD) officials in Washington then reviewed those detainees recommended for transfer to Guantanamo Bay. This internal review panel, which included DoD lawyers, provided a recommendation to the Secretary of Defense, who made the final decision whether a detainee should be transferred to Guantanamo Bay.³³

Through this process, hundreds of detainees were certified for transfer to the secure detention facility at Guantanamo Bay. This number, however, represented less than ten percent of the over 10,000 individuals originally detained in Afghanistan.³⁴ Moreover, hundreds of detainees originally sent to Guantanamo Bay have since been released. By the end of 2007, 500 detainees had been relocated to other countries via transfer or release and more than 60 were eligible for transfer or release pending negotiations between the U.S. State Department and other nations who might accept the detainees. That left a total of approximately 275 detainees remaining at Guantanamo Bay at the beginning of 2008.³⁵

One criticism of the above detention procedures was that they did not constitute Article 5 Tribunals under the Third Geneva Convention, as implemented by the U.S. military. Because of the February 2002 Presidential determination that the Geneva Conventions did not apply to the Taliban or al Qaeda detainees, DoD devised procedures to decide whether a detainee met the Secretary of Defense criteria for transfer to Guantanamo Bay that were separate from its procedures for Article 5 Tribunals. Article 5 of the Third Geneva Convention on POWs provides:

Should doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the

protections of the present Convention until such time as their status has been determined by a competent tribunal.³⁶

Army Regulation 190-8 implements Article 5 by outlining procedures for determining the status of those who fall within its provisions. That regulation provides that a tribunal of three officers must conduct a formal hearing and make a recommendation to the convening authority on the individual's status based on a preponderance of the evidence. The hearing must be open unless there is testimony or other matters which would compromise security. Moreover, the captured individual must be advised of his rights, and allowed to attend all open sessions of the hearing, to call witnesses if reasonably available, and to testify on his own behalf.³⁷

Thus, with the Presidential determination that the detainees enjoyed no status under the Geneva Conventions and were, therefore, not entitled to Article 5 Tribunals, and with the transfer of several hundred detainees to Guantanamo Bay based on classified Secretary of Defense criteria, a very public debate raged over the Executive's legal basis to detain, and to continue to detain indefinitely, these individuals at Guantanamo Bay. Because the Geneva Convention provisions with regard to POW status and protections of civilians in times of international armed conflict did not apply to these detainees, some argued that the detainees represent a matter of first impression. Therefore, international law should be updated to address these individuals. Contrary to this assertion, however, a short review of the history of warfare reveals that nations have long dealt with individuals and groups who have engaged in fighting but who are not members of an armed force of a nation-state and, therefore, not entitled to POW status upon capture.

The Law of War

The law of war requires nations to grant certain privileges and protections to captured lawful enemy combatants. It further recognizes that nations may detain individuals and members of organizations who are fighting against them, but who do not meet the test for lawful combatancy. Once captured, these unlawful combatants have never been considered to be entitled to the privileges and protections granted to lawful combatants under the law of war.

Detention Authority

Most would agree that the detainees held at Guantanamo Bay are not entitled to POW status under the Third Geneva Convention, Article 4, nor are they entitled to any of the other privileges and immunities afforded to lawful combatants. One of the first documents to codify these privileges and immunities was the Lieber Code, which provided instruction on the lawful use of force for the U.S. Military during the Civil War.³⁸ The Lieber Code provided that a POW is not subject to punishment simply for being a member of an enemy armed force nor can the detaining nation take revenge on the POW by the intentional infliction of suffering, cruel imprisonment, or any other barbarity.³⁹ The Lieber Code also made clear that the killing, wounding or other warlike acts of those who are armed by a sovereign government against enemy combatants are not individual crimes or offenses.⁴⁰ According to the Lieber Code, however, those who commit hostilities, whether by fighting, destruction of property, or other raids, without being a part of the organized hostile army and without sharing continuously in the war are not entitled to the POW privileges.⁴¹

The U.S. Supreme Court acknowledged this class of combatants who are not entitled to POW status in the World War II case of Ex parte Quirin, which concerned the military commission convictions of eight Germans who had traveled to the United States in German submarines with instructions to destroy U.S. war industries and facilities during World War II.⁴² The Supreme Court found that not only did customary international law distinguish between the armed forces and the peaceful populations of an enemy nation, but it also drew a distinction between lawful and unlawful combatants. Lawful combatants, according to the Supreme Court, may be captured and detained as POWs. Unlawful combatants not only may be captured and detained, but they are also subject to trial and punishment by military tribunals for their acts, which render their belligerency unlawful.⁴³

These unlawful combatants, also referred to as unprivileged belligerents, are generally considered to be either civilians who have joined the conflict, or members of purported military organizations who do not meet the requirements for lawful combatant status.⁴⁴ The detention of such individuals has always been seen as a humane alternative to their being killed. During the U.S. Civil War, for example, numerous individuals were charged, and were shot, imprisoned or banished, either summarily if they were clearly guilty or after trial and conviction by a military commission based on their material support for groups of unlawful combatants.⁴⁵ The U.S. Attorney General during the Civil War found that individuals who join such organizations violate the law of war merely by their membership. He went on to explain that such organizations are denounced by the laws of war because of the atrocities they have committed throughout history.⁴⁶

In addition, warfare in the 20th Century provides many examples of captured detainees, who, similar to the Guantanamo Bay detainees, were not entitled to POW status under the Geneva Conventions but who, nevertheless, fought with or against lawful combatants. The International Committee of the Red Cross (ICRC) observed that World War II saw an “abnormal and chaotic situation in which relations under international law became inextricably confused” when countries were occupied, armistices signed, alliances reversed, and governments ceased to be while others went into exile or were newly formed. As a consequence, there existed many national groups who continued to take part in hostilities but who were not recognized as lawful combatants by their enemies.⁴⁷ An example of such unlawful combatants and their treatment is found in The Hostages Trial at the end of World War II. During that trial, a U.S. military tribunal found German Field Marshal Wilhelm List not guilty of executing captured Yugoslav and Greek partisans fighting against German forces. According to the military tribunal, these partisans were unlawful combatants who, upon capture, were subject to the death penalty. In doing so, the tribunal noted the established rule that a civilian who “aids, abets or participates in the fighting is liable to punishment as a war criminal under the laws of war,” and that only combatants of a country may legitimately engage in fighting and be entitled to POW status upon capture or surrender.⁴⁸

The ICRC acknowledged the differing treatment accorded to lawful versus unlawful combatants when it made efforts to secure POW status to captured “partisans” (i.e., those combatants for whom their adversaries refused to recognize lawful combatant status). The ICRC stated that they would attempt to gain POW status for these partisans “provided of course that they themselves had conformed to the

conditions laid down in Art. 1 of the regulations annexed to the IVth Hague Convention of 1907” (i.e., the requirements to be commanded by a person responsible for his subordinates; to have a fixed distinctive emblem recognizable at a distance; to carry arms openly; and to conduct their operations in accordance with the laws and customs of war).⁴⁹ These detainees included the French Free Forces, lead by General Charles de Gaulle.⁵⁰ By implication, the ICRC acknowledged that they *would not* seek POW status for those partisans who *did not* comply with the international law standards for treatment as POWs.

In addition, during the Vietnam conflict, the United States again experienced the difficult problems associated with the status of detainees. The United States’ official position was that hostilities in Vietnam constituted an international armed conflict and, therefore, the Geneva Conventions of 1949 applied in full.⁵¹ Combatant forces, however, ranged from regular forces of the United States, South Vietnam, and North Vietnam to the Regional Forces and Popular Forces of the South Vietnam Government, the Main Forces and Local Forces battalions of the Viet Cong, and the civilian Irregular Defense groups of the Viet Cong. Major General (MG) George Prugh, The Judge Advocate General of the Army from 1971-1975, and the senior legal advisor for the Military Assistance Command Vietnam from 1964-1966, observed in his book, *Law at War: Vietnam*:

The battlefield was nowhere and everywhere, with no identifiable front lines, and no safe rear areas. Fighting occurred over the length and breadth of South Vietnam, on the seas, into Laos and Cambodia, and in the air over North Vietnam. It involved combatants and civilians from a dozen different nations. Politically, militarily, and in terms of international law, the Vietnam conflict posed problems of deep complexity. The inherent difficulty of attempting to apply traditional principles of

international law to such a legally confusing conflict is well illustrated by the issue of prisoners of war.⁵²

According to MG Prugh, in 1965 a decision was made to turn all irregular forces over to the South Vietnamese civilian criminal justice system. During that year, the number of Viet Cong members and sympathizers, supporters and collaborators in South Vietnamese civilian jails doubled to over 18,000. By early 1966, there was no space for more prisoners in the existing jails and the cost of feeding the prisoners became difficult if not impossible. Therefore, as new prisoners were confined, others had to be discharged; the average time that prisoners were confined, including the Viet Cong, was about six months. Moreover, as MG Prugh notes, not only was it difficult to continue to jail these individuals, but to carry out criminal trials of a great number of Viet Cong was too much for the South Vietnamese resources to handle. Consequently, just a few months after apprehension, a Viet Cong member was usually back on the battlefield, while had he been a POW he could have been detained for the duration of the conflict.⁵³

Although most Viet Cong did not comply with Article 4 criteria to be accorded POW status under the Third Geneva Convention, the Military Assistance Command, Vietnam, lead by the United States, decided to accord POW status to the Viet Cong Main Force and Local Force troops, but not to spies, saboteurs and terrorists. Terrorists were defined as those who carried out attacks against civilians. The Viet Cong Main Force and Local Force troops were then detained in POW camps for the duration of the conflict.⁵⁴ Upon learning of the decision to treat these forces as POWs, a delegate of the ICRC in Saigon found it “a brilliant expression of a liberal and realistic attitude” that could “well be a most important one in the history of the humanitarian law, for it is the

first time . . . that a government goes far beyond the requirements of the Geneva Convention in an official instruction to its armed forces.”⁵⁵

The motivation for according POW status to those who did not fall within the POW definition in the Third Geneva Convention appears to have been twofold. First was a hope that the North Vietnamese and Viet Cong would, in turn, accord U.S. and other U.N. forces POW status upon capture. Second was a desire to prevent irregular forces from rejoining the fight. If these forces were treated as criminals and incarcerated in a South Vietnamese jail, they would be out of jail and back on the battlefield in a matter of months because of an overloaded South Vietnamese justice system. If they were treated as POWs, the Geneva Convention allowed them to be detained for the duration of the conflict.⁵⁶

Vietnam was not the last time the United States confronted the issue of detention prior to 9/11. Throughout the 1990s, the United States along with other U.N. member states operated detention facilities during a number of military operations authorized by the U.N. Security Council. These detentions were carried-out pursuant to U.N. Security Council Resolutions authorizing member nations to use all necessary means or measures under Chapter VII of the U.N. Charter to maintain peace and stability in a particular country.⁵⁷

In 1994, acting under a U.N. Security Council Resolution,⁵⁸ a Multi-National Force operating in Haiti was authorized to detain members of the Haitian military or police and individuals armed and threatening essential civic order. They could also detain anyone who posed a threat to the Multi-National Force or other protected persons, key facilities, or property designated mission-essential; committed a serious criminal act; or had

valuable information pertaining to individuals not yet detained. A U.S. Armed Forces Judge Advocate (JA) reviewed the evidence and a separate JA interviewed the detainee and articulated the argument against further detention on the detainee's behalf. Each detainee could make a statement through an interpreter and present facts rebutting the command's stated basis for detention.

Similarly, in 1996, acting under another Security Council Resolution,⁵⁹ a North Atlantic Treaty Organization Multi-National Implementation Force deployed to Bosnia was authorized to detain civilians if they obstructed friendly forces, interfered with their mission, or committed serious crimes in their presence. A process similar to that for Haitian detainees was used to review the evidence and determine whether continued detention was warranted. Again, in 1999 during operations in Kosovo authorized under a separate Security Council Resolution, an international security presence known as Kosovo Force was responsible for maintaining and where necessary enforcing, a ceasefire and establishing a secure environment.⁶⁰ The Military Technical Agreement with the Government of the Former Republic of Yugoslavia and Serbia authorized the Kosovo Force to detain individuals considered a threat to the military or to the overall mission. The standard for detention was generally the same as that in Bosnia and Haiti.⁶¹

Later in Kosovo, U.S. Task Force operations against Ethnic Armed Albanian Groups (EAAG) (insurgent groups) resulted in the detention of persons suspected of being EAAG members who were involved in violence, military training, or arms smuggling. Using the authority granted in the Security Council Resolution, the Supreme Allied Commander, Europe authorized the Kosovo Force Commander to order detention

outside the Kosovar criminal justice system.⁶² An informal board comprised of a JA, the provost marshal (a military policeman), and an intelligence officer reviewed the facts of every operational detention and made specific findings, based on a preponderance of the evidence. The detainee had no right to counsel, but could present matters as to why continued detention was not warranted.

Thus, a review of the history of warfare reflects that individuals and groups who are not part of the armed forces of a nation-state routinely have been present and fighting on the world's battlefields during armed conflicts. The rules of war, however, have never required such individuals to be provided the privileges and protections granted to those fighting on behalf of a sovereign government. Also, in the modern era where nations have sought to maintain peace and security throughout the world by undertaking operations under the auspices of the U.N., extra-judicial detentions of those who constitute a threat to those operations has consistently been viewed as a necessary component of the peace and security mission.

Status and Legal Protections of Unlawful Enemy Combatants

Once established that the United States has the authority to detain unlawful enemy combatants and that such individuals are not entitled to the combatant immunity and other protections as articulated over 150 years ago in the Lieber Code, and as further explained in the Third Geneva Convention on POWs, then what is their status and what laws, if any, protect them?

In search of a standard in international law, some have turned to the Geneva Conventions of 1949 and their protocols, arguing that because the Guantanamo Bay detainees are not lawful combatants entitled to POW status under the Third Geneva

Convention, they are by default civilians. As such, they may not be detained unless the U.S. Government can prove that they took a direct part in hostilities.⁶³ This argument is generally based on the language in Article 10, Protocol II Additional to the Geneva Conventions (which applies to non-international armed conflicts)⁶⁴ and Article 51, Protocol I Additional to the Geneva Conventions (which applies to international armed conflicts);⁶⁵ the United States is not a signatory to either protocol.⁶⁶ Article 10 and Article 51 provide certain protections to civilians “unless and for such time as they take a direct part in hostilities.”

It is far from settled, however, that the “direct part in hostilities” standard is the standard to use for the detention of civilians. There is no internationally agreed upon definition of what it means to take a “direct part in hostilities.” More fundamentally, however, is the fact that both Article 10 of Protocol II and Article 51 of Protocol I concern the protection of the civilian population from *attacks*. Arguably, therefore, by the plain language of both articles, a determination of whether a civilian is taking a direct part in hostilities is only significant in terms of deciding whether these civilians may be *attacked*, that is, whether lethal force may be used against them, and it does not set a standard with regard to whether a civilian may be *detained*.⁶⁷ As will be discussed in detail in the next section, the definition of “enemy combatant” adopted by the Administration as the standard to use when deciding whether an individual should be detained at Guantanamo Bay adheres to the international law standard for determining unlawful combatancy, without a need to extend the “direct participation in hostilities” language in the Protocols beyond their plain meaning.

Thus, a review of international law shows that the issue of unlawful combatants and their status under the law of war is not peculiar to the Guantanamo Bay detainees. Nevertheless, issues surrounding the rights of these detainees engender much emotion, not only in the United States, but around the world. Emotions run high, however, not simply because the United States is holding what it believes to be unlawful enemy combatants, but because this issue has been intertwined with allegations that these detainees have been mistreated and even tortured by U.S. personnel.

The rights of these detainees to avail themselves of U.S. domestic laws to challenge their detentions, in particular the right to bring a writ of *habeas corpus*, both under the U.S. Constitution and statutory law, may have long ranging effects.⁶⁸ Decisions by U.S. federal courts, and the laws passed by Congress in response thereto, have the potential to impact not only the current detainees held at Guantanamo Bay, but those taken by American forces in future combat operations, as well as U.N. and U.S. peace operations around the world. Indeed, the United States Court of Appeals for the District of Columbia is even now entertaining a writ of *habeas corpus* brought by an Afghan detainee held by the United States military at an air base in Bagram, Afghanistan. The court recently ordered the government to provide 30 days notice to the detainee prior to his transfer from the custody of the U.S. military in Afghanistan.⁶⁹

The United States must be careful that it does not implement laws and policies as an over reaction to the current situation without taking into account the long-term strategic interests of the United States. What are the implications of allowing the Guantanamo Bay detainees access to U.S. courts to challenge the commanders' actions in the field with regards to their status? Can these detainees be distinguished

from those being held by the U.S. military in Iraq or Afghanistan, or future combat and peace operations? Ultimately, will the result be that the United States must grant to its enemies in future overseas military operations the right to challenge their detention in U.S. courts?

Checks and Balances: Decisions by the Three Branches of Government

One of the first Supreme Court decisions regarding a detainee captured in Afghanistan, Hamdi v. Rumsfeld,⁷⁰ did not involve an alien detained at Guantanamo Bay but rather a United States citizen who was captured in Afghanistan and brought to the United States. On June 28, 2004, the Court held that due process demands that a citizen held in the United States as an enemy combatant must have a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker. The Court suggested that a possible standard could be met by a military tribunal, such as an Article 5 Tribunal for enemy detainees who assert POW status.

That same day, the Supreme Court also decided the case of the first enemy alien held at Guantanamo Bay, Cuba. This detainee had challenged his detention by petitioning a federal court for a writ of *habeas corpus*.⁷¹ In Rasul v. Bush, the Court held that the Federal *habeas corpus* statute extended to aliens at Guantanamo Bay.⁷² The Court, therefore, remanded the case to the Circuit Court of Appeals for the District of Columbia, who remanded it to the District of Columbia District Court to consider the detainee's *habeas corpus* claim.

The Executive immediately responded to these Supreme Court decisions. On July 7, 2004, the Deputy Secretary of Defense issued an order establishing Combatant Status Review Tribunals (CSRTs) to again review the status of each detainee held at

Guantanamo Bay, and on July 29, 2004, the Secretary of the Navy issued procedures implementing these tribunals.⁷³ The procedures were much like those required for Article 5 Tribunals in Army Regulation 190-8 that the Administration had determined in early 2002 were not applicable to the Guantanamo Bay detainees. The CSRT order made clear that each detainee already had been determined to be an enemy combatant through the multiple levels of review by military officers, as previously described.⁷⁴ It defined enemy combatant as:

An individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

This definition comports with the United States' past practices of detaining *members of enemy forces* fighting against it, whether deemed lawful and entitled to POW status or unlawful because they are part of a force not entitled to POW status under Article 4 of the Third Geneva Convention. It also incorporates those individuals who have participated in or directly supported hostilities against the United States. Again, these latter individuals have always been considered subject to detention under international law to prevent them from returning to the battlefield and committing additional hostile acts or continuing to directly support such acts against U.S. Forces.

The order establishing the CSRTs required the detainee to be notified of the opportunity to contest his designation as an enemy combatant, to consult with and be assisted by a personal representative, and to seek a writ of *habeas corpus* in U.S. federal court.⁷⁵ The personal representative, who was not a military lawyer, was allowed to review any reasonably available information in the possession of DoD relevant to an enemy combatant determination, but also could be obligated to divulge at

the hearing any information the detainee provided to him or her.⁷⁶ Additionally, the personal representative could not share with the detainee any of the classified information used to determine his status.⁷⁷ The CSRT used a preponderance of the evidence standard when deciding whether the detainee was properly detained as an enemy combatant.⁷⁸

Shortly before the Supreme Court decisions and CSRT implementation, the Deputy Secretary of Defense had also established an Administrative Review Board (ARB) with a charter to annually review the status of Guantanamo Bay detainees. The ARB assessed whether each enemy combatant remained a threat to the United States and its allies, or if there was any reason that it was in their interest for the detainee to remain in the control of DoD, such as if the detainee remained of intelligence value or there was a law enforcement interest in the detainee.⁷⁹

At the end of 2005, Congress also responded to the Supreme Court's decision in Rasul v. Bush that an enemy alien held at Guantanamo Bay was entitled to bring a statutory writ of *habeas corpus*, by specifically amending the federal *habeas* statute to provide that no court, justice, or judge could exercise jurisdiction over a writ of *habeas corpus* filed by an alien detained at Guantanamo Bay.⁸⁰ In addition, the law, entitled the "Detainee Treatment Act of 2005" (DTA), provided for judicial review of the CSRT decisions in the Circuit Court of Appeals for the District of Columbia.⁸¹ The DTA limited the court's review to whether the status determination was consistent with the CSRT standards and procedures, including whether the conclusion was supported by a preponderance of the evidence allowing a rebuttable presumption in favor of the government's evidence.⁸²

The DTA also required that the CSRT and ARB procedures provide for a periodic review of any new evidence relating to the enemy combatant status of the detainee.⁸³ Moreover, the DTA required the CSRT and ARB procedures, to the extent practicable, to assess whether any statement derived from or relating to the detainee was obtained as a result of coercion and the probative value, if any, of such statements.⁸⁴

After Congress enacted the DTA, the Government found itself back in U.S federal court defending the meaning of the DTA's language purporting to take away detainees' rights to bring a writ of *habeas corpus* under the federal statute. The Supreme Court again sided with the detainees, holding in Hamdan v. Rumsfeld that the DTA did not strip federal courts of jurisdiction over *habeas* cases pending at the time of the DTA's enactment.⁸⁵ The Hamdan decision also dealt a serious blow to the military commissions established by the Presidential Military Order in November 2001. The Supreme Court held the military commission constituted to try Hamdan was not authorized by Congress, as required by law, and that it lacked the power to proceed because its structure and procedures violated both the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions.⁸⁶

First, the Court found that the military commission rules were illegal because they deviated in many significant respects from the rules for courts-martial without the required Presidential showing of impracticability, as required by the UCMJ.⁸⁷ Second, contrary to the Presidential determination in 2001, the Court found that Common Article 3 of the Geneva Conventions applied to the Guantanamo Bay detainees.⁸⁸ Furthermore, the Court found that the commission rules violated Common Article 3's requirement that Hamdan be tried by a "regularly constituted court affording all the

judicial guarantees which are recognized as indispensable by civilized peoples.”⁸⁹ The Court specifically pointed to the provisions of the commission rules that they said “dispense[d]” with the UCMJ and customary international law requirements “that the accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him”⁹⁰ and stated that “at least without express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him.”⁹¹

Congress responded again to the Supreme Court, amending the DTA to make clear that it took effect on the date of enactment and applied to all cases, without exception, pending on or after the date of the enactment of the DTA.⁹² This same law, entitled the Military Commissions Act (MCA), provided the statutory authorization for the military commissions that the Supreme Court had declared lacking. It also made several changes to the original military commissions to address the substantive concerns raised by the Supreme Court with regard to the commission rules, and to ensure the military commissions were consistent with Common Article 3’s requirements.⁹³

The new commission rules include that the detainee has the right to be present at all sessions of the commission other than deliberations or voting, except if excluded by the judge because the accused is disruptive or poses a threat to safety.⁹⁴ Additionally, the rules exclude all statements obtained by torture.⁹⁵ Statements made before enactment of the DTA where the degree of coercion is disputed may be admitted only if the judge finds that the statement is reliable and has probative value and the interests of justice are served by admission of the evidence. Such statements made after

enactment of the DTA have an additional qualifier: they may only be admitted if the interrogation methods used to obtain the statements do not amount to cruel, inhuman, or degrading treatment prohibited by the DTA.⁹⁶ Further, the MCA provides for a national security privilege to protect disclosure of classified information detrimental to national security.⁹⁷ Finally, any evidence may be admitted if the judge decides the evidence would have probative value to a reasonable person. Therefore, hearsay evidence that is not typically admissible in a courts-martial may be admitted if the proponent of that evidence makes it known to the adverse party, unless the judge finds that the value of the evidence is outweighed by the danger of unfair prejudice or it would cause undue delay or constitute a waste of time.⁹⁸

Even with these additional protections, litigation continued unabated. In February 2007, the U.S. Court of Appeals for the District of Columbia held in Boumediene v. Bush that the detainees were not entitled to bring a statutory writ of *habeas corpus* given the amendment in the MCA to the statutory writ to exclude them. The court further found that the detainees did not have a constitutional right to a writ of *habeas corpus* under the Suspension Clause of the U.S. Constitution which provides that “[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”⁹⁹ After first denying detainees’ application for a writ of *certiorari* to review the appellate court’s decision in April 2007, the Supreme Court reversed itself and granted the writ in June 2007.¹⁰⁰

Concurrent with the litigation over a detainee’s right to bring a writ of *habeas corpus*, detainees were also challenging their CSRT determinations, as authorized in the DTA. Almost 200 cases were filed in the Circuit Court of Appeals for the District of

Columbia requesting review of the detainees' CSRT determinations that they were unlawful enemy combatants. In July 2007, the court in Bismullah v. Gates found that to allow review of the CSRT determination that a preponderance of the evidence existed to support a determination that a detainee was an enemy combatant, the court must have access to all the information available to the CSRT. Therefore, the court held that the record on review was all information a CSRT was authorized to obtain and consider. The court also instituted a protective order, finding that counsel for the detainee had a need to know the classified information relating to his or her clients' case, except that the government may withhold from counsel, but not the court, certain highly sensitive information.¹⁰¹ In February 2008, the government petitioned the Supreme Court for a writ of *certiorari* requesting review of the Bismullah court's decision with regard to what information must be provided to detainees' counsel.¹⁰²

Thus, by 2006, the U.S. Supreme Court finally settled the issue of whether the detainees held at Guantanamo Bay were entitled to any protections under the Geneva Conventions of 1949, finding that Common Article 3 did apply to these detainees.¹⁰³ Additionally, as the calendar turned to 2008, detainees at Guantanamo Bay continued to litigate in U.S. federal court both their right to bring a writ of *habeas corpus* under the U.S. Constitution to have the court review the evidence of their detainment and their CSRT determinations that they were enemy combatants, including what information they or their counsel were entitled to obtain.

The Way Ahead

As Edmund Burke, the Irish political statesman and philosopher once said, "[t]he only thing necessary for the triumph of evil is for good men to do nothing." Since the

first detainees arrived at the Guantanamo Bay detention facility in early 2002 the United States has struggled to find a way to ensure it protects its citizens from further catastrophic attacks by terrorists, while at the same time ensuring a legitimate process to determine whether each individual that it sends to Guantanamo Bay is truly an unlawful enemy combatant who should be detained indefinitely at that facility. During the days and months that followed the 9/11 terrorist attacks, the United States enjoyed support throughout the world. None seriously questioned the right of the United States to use military force to defend itself against the nations, organizations and persons responsible for the 9/11 terrorist attacks. By invoking its legitimate right of self-defense under international law, the United States was able to use the laws of war, not the U.S. criminal laws, to topple the Taliban Government in Afghanistan, and to pursue, and capture or kill those responsible for the attacks. The United States used its military might to track down these terrorists around the world.

Once the path was chosen to use military force in self-defense under international law, rather than use law enforcement personnel under U.S. law, those who were captured logically fell under the laws of war. Deciding what those laws are and how to apply them to the detainees held at Guantanamo Bay appropriately fell to the President in his constitutional role as Commander-in-Chief. Some of the early decisions, however, in particular that Common Article 3 did not apply to the conflict with al Qaeda and the means and methods of interrogation created a very public controversy that diminished support for U.S. authority throughout the world and handed its enemies a useful weapon in its information operations arsenal. Further, as months turned to years without additional terrorist attacks within the United States, the initial fear that fueled the

almost total backing of the Administration's policies to thwart additional terrorist attacks waned. Hindsight is, of course, always much clearer, and it is to the future that the United States must now look to regain its credibility while at the same time continuing to protect itself against terrorist organizations.

As an initial matter, the Guantanamo Bay detention facility should not be closed. Some have called for its closure, apparently believing that to do so would assist the United States in regaining world trust over its handling of suspected terrorists. But, there is no acceptable alternative to closing the facility. The United States cannot simply release individuals whom it believes are members of terrorist organizations responsible for thousands of U.S. deaths, not to mention the practical consideration of finding suitable countries to accept such individuals. Likewise, it is simply unrealistic to believe that transferring these detainees to a different facility, such as one in the United States, will quiet those who shout in disagreement over the current procedures used to detain these individuals and try them by military commission.

It is not the place, but the process, that must be changed. The most important change involves transparency. As much as possible, the entire process—from ARBs and CSRTs to military commissions—must be open to public scrutiny. In the case of the Guantanamo Bay detainees, secrecy has, indeed, bred suspicion. It has also given opponents of the system the only voice, and it has been a harsh one. For example, many of the detainees, through their legal counsel, have argued that they are innocent civilians mistakenly caught up in a war that they had nothing to do with and who have been detained for years and harshly treated without any right to contest their detention. There is little evidence offered in response: much of it is classified.

The Administration should first act to declassify, to the greatest extent possible, the criteria DoD uses to decide whether to transfer an individual to Guantanamo Bay in the first place. Next, the Administration should take a fresh look at the CSRT procedures. The CSRT rules should be changed to provide more transparency over the entire process so that the public may more fully understand the basis for each individual's detention. In this regard, DoD must seriously re-look the classified evidence used to detain individuals and make efforts to declassify and make available as much of the information as possible. Moreover, consideration should be given to inviting neutral monitors into the hearings.

Nevertheless, as they are now constituted after judicial review and Congressional action, the CSRTs generally provide a reasonable balance between the rights of the detainees and the United States' right to protect itself through detaining unlawful enemy combatants. The CSRT rules should be updated, however, to include additional protections for the detainees. One such protection would be to provide detainees the right to be represented at the CSRT hearing by a detailed military defense counsel. The current system providing for a personal representative is not sufficient because the personal representative is not a confidential advisor and anything the detainee tells the representative may be provided to the tribunal.

Perhaps the most problematic detention issue is its indefinite nature. Many are not comfortable with the United States holding unlawful enemy combatants for what they argue could be decades. Nevertheless, the United States is authorized under international law to detain unlawful combatants for the duration of the war to prevent them from returning to the battlefield.¹⁰⁴ It has been seven years since the first

detainees were brought to Guantanamo Bay. The Vietnam conflict saw the longest held American POW: nine years.¹⁰⁵ To date, the period that the Guantanamo Bay detainees have spent in detention, without more, is not sufficient justification to release them. In addition, the ARBs meet annually to review a detainee's detention, and both the ARB and the CSRT must consider any new evidence that the United States receives on a particular detainee. As long as the process for their detention is credible, and the United States has sufficient evidence to prove they are unlawful enemy combatants, the length of their current detention is not unreasonable. That is not to say, however, that at some point in the future, the continued detention of these individuals may become unreasonable and the United States must give serious consideration to their release. This must be done, however, based on an assessment of each individual detainee and not simply based on the years of their detention

The final process is the military commissions. Certainly, the United States is well within international law to use military commissions to try unlawful combatants for war crimes. The rationale for using such tribunals for both lawful and unlawful combatants alike is that military fact-finders are better able to understand and account for law of war considerations. Moreover, the laws of war recognize that tribunals established to try war criminals must consider the fact that evidence may involve sensitive operational information that cannot be divulged in open court and that all relevant evidence should be considered.¹⁰⁶ Thus, what is decried by commission detractors as evidence of an unfair process (i.e., closed hearings to entertain classified information and the admission of any evidence considered relevant), has been viewed as acceptable procedures to try alleged war criminals under the rules of war.

Additionally, both Congress and the President have made the decision to try the Guantanamo Bay detainees by military commission. The United States Constitution gives to Congress the power to “define and punish offences . . . against the laws of nations.”¹⁰⁷ Congress has done so by passing the MCA and providing that these detainees be tried by military commission. The President, as Commander-in-Chief, and those subordinate to him in the Executive Branch have made rules to carry-out this Congressional mandate. The judiciary, on the other hand, is charged with interpreting both the laws passed by Congress and the Executive’s rules implementing those laws, and in ensuring that both comply with the U.S. Constitution. These checks and balances are a key to U.S. democracy. No doubt, zealous defense attorneys will challenge in court the procedures laid out by Congress in the MCA and further defined by the Secretary of Defense; that is their job. Nevertheless, the military commissions are not illegal and have long been considered the appropriate choice of venue for trying combatants for war crimes, whether those combatants are lawful or unlawful.

Although the MCA and the military commission rules now provide for a balanced process to try Guantanamo Bay detainees, the Administration must begin with haste to try these individuals. Although the President quickly issued his order establishing the military commissions only two months after 9/11, the United States now finds itself, seven years later, having tried only one detainee, the Australian David Hicks. The public perception, whether right or wrong, is that there has been a lot of foot dragging over the commissions, which again has led to suspicion over whether the United States really has sufficient evidence against those they have detained at Guantanamo Bay. The United States must begin referring as many detainees to a military commission as

possible and trying them through a system that is as transparent as it can be, while still protecting legitimate national security interests. The current system contains the rules to make this happen.

We start and end contemplating evil. In the 21st Century, Usama bin Laden, al Qaeda, and like-minded terrorist organizations now have the ability to carry-out atrocities against innocent civilians on a scale not contemplated by similar organizations that came before them. In protecting its citizens, the Executive and Legislative Branches must act to keep U.S. citizens safe, while adhering to the international laws of warfare that provide certain protections and processes to those whom the United States hold as their enemies. Although the Judicial Branch has not always found these processes to be lawful under U.S. law, Congress and the President have adjusted accordingly.

Sir Robert Thompson, a renowned counterinsurgency expert who has written extensively on the topic and who served as the Chief of the British Advisory Mission to Vietnam, has observed that detention without trial may seem repugnant to a society who has a tradition of justice wherein a person is confined only upon the order of a judge or a sentence of a court after a fair and impartial trial. Nevertheless, as Sir Thompson notes, in time of war, whether considered international or of a non-international character, or in periods of extreme political violence, detention is recognized as a powerful weapon in a government's arsenal and has always been used.¹⁰⁸ The United States has no choice but to continue to fight terrorism throughout the world; it cannot sit by and do nothing. The United States must, however, ensure that the means and methods it uses to fight, including the internationally-recognized

authority of a nation to detain unlawful enemy combatants and try them by military tribunal for war crimes, at all times adhere to the principals and ideals of the laws of war.

Endnotes

¹ Weber, Max, "*Politics as a Vocation*," in MAX WEBER: ESSAYS IN SOCIOLOGY (Hans Gerth and C. Wright Mills ed. and trans., New York: Oxford University Press, 1946) (1918) (citations omitted).

² 9/11 by the Numbers, Death, Destruction, Charity, Salvation, War, Money, Real Estate, spouses, Babies, and Other September 11 Statistics, NEW YORK MAG., Sept. 2002, *available at* <http://nymag.com/news/articles/wtc/1year/numbers.htm>.

³ U.S. WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, *President's Remarks at the Pentagon: Remarks by the President in Observance of September 11* (Sept. 11, 2002), *at* <http://www.whitehouse.gov/news/releases/2002/09/print/20020911.html>.

⁴ U.S. DEP'T OF STATE, *Fact Sheet: Usama bin Ladin* (Aug. 21, 1998), *at* http://www.state.gov/www/regions/africa/fs_bin_ladin.html.

⁵ U.S. DEP'T OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, *2001 Report on Foreign Terrorist Organizations* (Oct. 5, 2001), *at* <http://www.state.gov/s/ct/rls/rpt/fto/2001/5258.htm>.

⁶ *9/11 Five Years Later: Successes and Challenges*, 3 (Sept. 2006), *at* <http://www.whitehouse.gov/nsc/waronterror/2006/waronterror0906.pdf>

⁷ EXEC. ORDER NO. 13,129, 31 C.F.R. § 545 (Jul. 4, 1999).

⁸ *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2838 (2006) (Thomas, J., dissenting).

⁹ 50 U.S.C. §§ 1541-1548.

¹⁰ Authorization to Use Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

¹¹ See Letter to Congress on American Campaign Against Terrorism (Sept. 24, 2001), *at* <http://www.whitehouse.gov/news/releases/2001/09/20010924-17.html>. Additionally, on September 25, 2001, the Administration announced that the war against terrorism outside the United States would be known as Operation ENDURING FREEDOM (OEF). See DoD News Briefing, Secretary Rumsfeld (Sept. 25, 2001), *at* <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=1929>.

¹² See Declaration of War Against Great Britain, 2 Stat. 755 (June 18, 1812) (authorizing the President to use the land and naval forces of the United States to carry on war against Great Britain and Ireland); Declaration of War Against Germany, 40 Stat. 1 (Apr. 6, 1917) (authorizing the President to employ the entire naval and military forces to carry on war against

the Imperial German Government); Declaration of War Against Japan, 55 Stat. 795 (Dec. 8, 1941) (authorizing the President to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan); Declaration of War Against Germany, 55 Stat. 796 (Dec. 11, 1941) (authorizing the President to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Government of Germany); Maintenance of International Peace and Security in Southeast Asia, 78 Stat. 384 (Aug. 10, 1964) (authorizing the President to take all necessary steps, including use of armed force to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom); Authorization for Use of Military Force Against Iraq, 105 Stat. 3 (Jan. 14, 1991) (authorizing the President, subject to certain reporting to the Congress, to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677).

¹³ See Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Oct. 9, 2001), at <http://www.whitehouse.gov/news/releases/2001/10/20011009-6.html>

¹⁴ Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

¹⁵ *Id.* § 1(e).

¹⁶ *Id.* § (2)(a). Such acts must have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy. The military order also authorized the Secretary of Defense to detain individuals subject to the order at an appropriate location either inside or outside the United States and required that the Secretary of Defense treat the individuals humanely, provide adequate food, water, shelter, clothing, and medical treatment, and allow the free exercise of religion consistent with requirements of detention. *Id.* § 3.

¹⁷ JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS, 544 (12 Apr. 2001) (as amended 17 Oct. 2007); see also 10 U.S.C. § 2331(1).

¹⁸ *Id.* § 3.

¹⁹ U.S. DEP'T OF DEFENSE, MILITARY COMMISSION ORDER NO. 1, Subject: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, para. 5 (Mar. 21, 2002).

²⁰ *Id.* para. 6B(3).

²¹ *Id.* para. 6B(5).

²² See, generally, Center for Law and Military Operations, Legal Lessons Learned From Afghanistan and Iraq: Volume I, Major Combat Operations (11 September 2001 to 1 May 2003), 51-54 (Aug. 1, 2004) [hereinafter OEF Legal Lessons Learned].

²³ Memorandum, President George W. Bush, to The Vice President, The Secretary of State, The Secretary of Defense, The Attorney General, The Chief of Staff to the President, The

Director of Central Intelligence, The Assistant to the President for national Security Affairs, The Chairman of the Joint Chiefs of Staff, Subject: Humane Treatment of Taliban and al Qaeda Detainees, para. 2 (Feb. 7, 2002) at http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf [hereinafter Presidential Detainee Status Memorandum].

²⁴ *Id.* para. 2.d. See also Memorandum, Office of the Legal Counsel, Office of the Assistant Attorney General, U.S. Department of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, Subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), available at <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf>.

²⁵ Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 4(A), Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter Third Geneva Convention].

²⁶ See generally, *id.*; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516 [hereinafter Fourth Geneva Convention].

²⁷ Third Geneva Convention, *supra* note 25, art. 3.

²⁸ Presidential Detainee Status Memorandum, *supra* note 23.

²⁹ *Id.* para. 3.

³⁰ OEF Legal Lessons Learned, *supra* note 22, at 54.

³¹ *Id.*

³² 10th Mountain Division After Action Report, OEF IV: May 2003 – April 2004, Notes, 17 June 2004 (on file with author). If the detainee was ordered released, the International Committee of the Red Cross helped pay for travel to their home. *Id.*

³³ See Deputy Secretary of Defense Order, Subject: Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba (May 11, 2004), at <http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf>.

³⁴ See Bialke, Lieutenant Colonel Joseph, Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict, 55 AIR FORCE LAW REVIEW 1, fn 70 (2004), citing to DoD News: Secretary Rumsfeld Remarks to Greater Miami Chamber of Commerce, Presenter: Donald H. Rumsfeld, Secretary of Defense, 4 (Feb. 13, 2004).

³⁵ News Release, *JTF Guantanamo Marks 500th Detainee Transfer, Standard, Sergeant Amy*, JTF Guantanamo Public Affairs, at <http://www.jftgtmo.southcom.mil/storyarchive/2008/08janstories/010408-1-500transfer.html>.

³⁶ Third Geneva Convention, *supra* note 25, art. 5.

³⁷ U.S. DEP'T OF ARMY, REG. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and other Detainees, para. 1-6 (Oct. 1, 1997).

³⁸ See generally, U.S. DEP'T OF WAR, GENERAL ORDER NO. 100, Instructions for the Government of Armies of the United States in the Field (Lieber Code) (Apr. 24, 1963).

³⁹ *Id.* art. 56.

⁴⁰ *Id.* art. 57.

⁴¹ *Id.* art. 82.

⁴² *Ex parte Quirin*, 317 U.S. 1, 21 (1942).

⁴³ *Id.* at 30-31 (citations omitted).

⁴⁴ Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI.J.INT'L L. 511, 522 (Winter 2005). Israel has also similarly defined "unlawful combatant." See Detention of Unlawful Combatants Law, § 2, 2002, 1834 Sefer Hahukim (S.H.) 192. The Israeli law defines an unlawful combatant as anyone who participates—directly or indirectly—in hostile acts against the State of Israel or *is a member of a force* perpetrating hostile acts against the State of Israel and who is not entitled to prisoner of war status under Geneva Convention III (emphasis added).

⁴⁵ Winthrop, William, MILITARY LAW AND PRECEDENTS, 784 (Gov't Printing Office, 2d ed. 1920). During the U.S. Civil War, there were, in fact, "numerous rebels . . . that furnished[ed] the enemy with arms, provisions, clothing, horses, and means of transportation; [such] insurgents [we]re banding together in several of the interior counties for the purpose of assisting the enemy to rob, to maraud and to lay waste to the country. All such persons are by the laws of war in every civilized country liable to capital punishment." H.R. Doc. No. 65, 55th Cong., 234 (1894). Indeed, Civil War military commissions tried numerous individuals for membership in guerrilla organizations. See, e.g., U.S. WAR DEP'T., GENERAL COURT-MARTIAL ORDER NO. 51, p.1 (1866) ("G.C.M.O.") (indictment in the military commission trial of James Harvey Wells charged "[b]eing a guerrilla"; G.C.M.O. No. 108, Head-Quarters Dept. of Kentucky, p.1 (1865) (indictment in the military commission trial of Henry C. Magruder charged "[b]eing a guerrilla" and "join[ing]" "a band of guerrillas"); G.C.M.O. No. 41, p.1 (1864) (indictment in the military commission trial of John West Wilson charged that Wilson "did join and cooperate with an armed band of insurgents and guerrillas who were engaged in plundering the property of peaceable citizens . . . in violation of the laws and customs of war"); G.C.M.O. No. 93, p. 9 (1864) (indictment in the military commission trial of James A. Powell charged "[t]ransgression of the laws and customs of war" and specified that he "did join himself to and, in arms, consort with . . . a rebel enemy of the United States, and the leader of a band of insurgents and armed rebels"); *id.* at 10-11 (indictment in the military commission trial of Joseph Overstreet charged "[b]eing a guerilla" and specified that he "did join, belong to, consort and co-operate with a band of guerrillas, insurgents outlaws, and public robbers"). See Government's Response to the Defense's Motion to Dismiss Charge IV (Material Support for Terrorism), 8 (Dec. 14, 2007) in the case of *United States of America v. Omar Ahmed Khadr*, Military Commissions.

⁴⁶ See Government's Response to the Defense's Motion to Dismiss Charge III (Conspiracy), 12 (Dec. 14, 2007) in the case of *United States of America v. Omar Ahmed Khadr*, Military Commissions (citing 11 Op. Atty. Gen. 297, 312 (1865)).

⁴⁷ INT'L COMM. OF THE RED CROSS, *Report on Activities During the Second World War (September 1, 1939-June 30, 1947)*, Volume I, 516 (Geneva, May 1948) [hereinafter ICRC Report, Vol. I].

⁴⁸ *Trial of Wilhelm List and Others*, VIII War Crimes Reports, 35, 58.

⁴⁹ Hague Convention No. IV, 18 October 1907, Respecting the Laws and Customs of War on Land, T.S. 539, Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land, art. 1; ICRC Vol. I, *supra* note 46, at 516.

⁵⁰ *See generally, id.* at 519-38.

⁵¹ Prugh, Major General George, *LAW AT WAR: VIETNAM, 1964-1973*, 63 (Dep't of Army, Wa., D.C. 1975).

⁵² *Id.* at 62.

⁵³ *Id.* at 64.

⁵⁴ *Id.* at 66.

⁵⁵ *Id.* at 66-7.

⁵⁶ Third Geneva Convention, *supra* note 25, art. 118.

⁵⁷ Chapter VII authorizes the United Nations Security Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security . . . [including] demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations." UNITED NATIONS CHARTER, Chapter VII, Article 42.

⁵⁸ The United Nations Security Council (UNSC) voted to form a multi-national force (MNF) authorized to "use all necessary means to facilitate the departure from Haiti of the Military leadership . . . the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment" S.C. Res. 940, U.N. SCOR, 49th Sess., S/RES/940 (1994).

⁵⁹ S.C. Res. 1031, U.N. SCOR, 3607 mtg., U.N. Doc. S/RES/1031 (Dec. 15, 1995). The UNSC also authorizes member states to take all necessary measures to effect implementation of and to ensure compliance with military aspects of the General Framework Agreement for Peace (GFAP), which gives the IFOR Commander the authority to do all that the commander judges necessary and proper, including the use of military force, to protect IFOR. *Id.*

⁶⁰ S.C. Res. 1244, U.N. SCOR, 4011 mtg., U.N. Doc. S/RES/1244 (1999).

⁶¹ Military Technical Agreement Between the International Security Force (KFOR) and The Governments of the Federal Republic of Yugoslavia and the Republic of Serbia (Jun. 9, 1999) [hereinafter MTA]. Task Force Falcon, the U.S. Task Force under the command of KFOR, detained, among others, individuals who posed a threat to KFOR, other protected persons, key facilities, or property designated mission essential; and individuals who had valuable information pertaining to persons not yet detained and who were a threat to the force, committed serious

crimes, or were armed and threatened civic order. Similar to detention reviews in Haiti and Bosnia, a JA reviewed the case and a second JA, acting as the detainee's representative but with no attorney-client relationship, assisted the detainee in rebutting the grounds for continued detention and ensuring that the detainee understands the process and articulates the best case for release. The detainee was allowed to present his case before the JA made a recommendation to the TF Commander. Eventually, the United Nations Mission in Kosovo (UNMIK) established an Emergency Judicial System to review the detentions. Even when the investigating magistrate ordered a detainee released, however, the TF Commander could petition the KFOR Commander to order the detainee held until trial if considered a threat to the force. KFOR determined that UNSCR 1244 and the MTA contained the authority to continue to hold detainees ordered released by a Kosovar magistrate. See MTA, art. 1, para 2 (authorizing KFOR to take "all necessary action to establish and maintain a secure environment"); art. 1, para. 4 (authorizing KFOR to take such "action as are required including the use of necessary force to ensure protection of [KFOR]"); app. B (authorizing KFOR to "do all that [the commander] judges necessary and proper, including the use of military force, to protect KFOR").

⁶² Fragmentary Order 997, 241615 Mar 01, KFOR subject: Operation Consistent Effort (classified NATO document).

⁶³ See, e.g., Knut Dormann, *The Legal Situation of "Unlawful/Unprivileged Combatants*, Vol. 85, No. 849, RICR MARS IRRC, 45-73 (Mar. 2003).

⁶⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Jun. 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

⁶⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed conflict (Protocol I) art. 51, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

⁶⁶ Protocol II, unlike Protocol I, was forwarded to the Senate for advice and consent by President Ronald Reagan, but the Senate failed to act to ratify the protocol. See President Ronald Reagan, Letter of Transmittal, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on 10 June 1977, S. Treaty Doc. No. 2, 100th Cong., at 7 (1987).

⁶⁷ In fact, the Fourth Geneva Convention provides that civilians may be interned if they are suspected of or engaged in activities hostile to the security of the state. Fourth Geneva Convention, *supra* note 26, arts. 5 and 78.

⁶⁸ The writ of *habeas corpus* is a civil proceeding in which a court inquires as to the legitimacy of a prisoner's custody. *Black's Law Dictionary* 638-39 (5th ed. 1979). The U.S. Constitution provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." U.S. CONST. art. I, § 9, cl. 2. The federal statutory right to bring a writ of habeas corpus does not extend to a prisoner unless:

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

28 U.S.C. § 2241.

⁶⁹ *Ruzatullah and Rohullah v. Gates*, Case No. 07-5402 (D.C. Cir., 2007).

⁷⁰ *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004).

⁷¹ See *supra*, note 68 (defining the statutory writ of *habeas corpus*).

⁷² *Hamdi*, *supra* note 70.

⁷³ Memorandum, Deputy Secretary of Defense, to Secretary of the Navy, Subject: Order Establishing Combatant Status Review Tribunals (Jul. 7, 2004), at www.defenselink.mil/news/Jul2004/d20040707review.pdf [hereinafter 2004 CSRT Order]; Memorandum, Secretary of the Navy, subject: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (Jul. 29, 2004), at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf> [hereinafter 2004 CSRT Procedures].

⁷⁴ 2004 CSRT Order, *id.* para. a.

⁷⁵ *Id.* para. b

⁷⁶ *Id.* para. c; 2004 CSRT Procedures, *supra* note 73, encl. 3.

⁷⁷ 2004 CSRT Procedures, *id.* encl. 3(C)(4).

⁷⁸ 2004 CSRT Order, *supra* note 73, para. g(12).

⁷⁹ Deputy Secretary of Defense Order, OSD 06942-04, Subject: Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba (May 11, 2004) The procedures were further amended to exclude from the ARB process those detainees whom the President determined were subject to a military commission until the disposition of any charges against them or the service of any sentence imposed by the commission. See Memorandum, Deputy Secretary of Defense, Subject: Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained

at U.S. Naval Base Guantanamo Bay, Cuba, para. 2 (Jul. 14, 2006) (citing to Deputy Secretary of Defense Memorandum (Jun. 4, 2004)) [hereinafter 2006 ARB Procedures].

⁸⁰ See 28 U.S.C. 2241; Detainee Treatment Act of 2005, PUB. L. NO. 109-148, § 1005 (2005) [hereinafter DTA].

⁸¹ DTA, *id.* § 1005(e).

⁸² *Id.* § 1005(e)(2)(C).

⁸³ *Id.* § 1005(a)(3).

⁸⁴ *Id.* § 1005(b)(1). The DTA also required the Secretary of Defense to submit to Congress a report setting forth the procedures for both the CSRTs and the ARBs. *Id.* § 1005(a)(1)(A). In July 2006, the Deputy Secretary of Defense updated the 2004 CSRT and ARB procedures to incorporate the new requirements set forth in the DTA. See Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, and Under Secretary of Defense for Policy, Subject: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, (Jul. 14, 2006); 2006 ARB Procedures, *supra* note 79.

⁸⁵ *Hamdan*, *supra* note 8, at 2753-54.

⁸⁶ *Id.* at 2754. See also Uniform Code of Military Justice [hereinafter UCMJ], article 36 which provides that “[a]ll rules and regulations made under this article shall be uniform insofar as practicable.” 10 U.S.C. § 836.

⁸⁷ *Hamdan*, *id.* at 2754-55. The UCMJ requires that all proceedings other than votes and deliberations “shall be made a part of the record and shall be in the presence of the accused.” 10 U.S.C. § 839(c).

⁸⁸ *Hamdan*, *id.* at 2756-57.

⁸⁹ *Id.* at 2796 (citing to the Third Geneva Convention, *supra* note 25, art. 3(1)(d)).

⁹⁰ *Id.* at 2798.

⁹¹ *Id.*

⁹² Military Commission Act, PUB. L. NO. 109-366, 120 Stat. 2600 (2006) [hereinafter MCA].

⁹³ See John B. Bellinger, III, Legal Advisor to the Secretary of State, Address at the London School of Economics: Legal Issues in the War on Terrorism (Oct. 31, 2006) at www.state.gov/s/l/rls/76039.htm.

⁹⁴ MCA, *supra* note 92, § 949d(3)(a).

⁹⁵ *Id.* § 948r(b) (except against a person accused of torture as evidence that the statement was made).

⁹⁶ *Id.* § 948r(c)(d).

⁹⁷ *Id.* § 949d(f)

⁹⁸ *Id.* § 949a(b)(2)(E).

⁹⁹ *Boumediene v. Bush*, 476 F.3d 981, 994 (Feb. 20, 2007); U.S. CONST., art. I, § 9, cl. 2.

¹⁰⁰ *Boumediene v. United States and al Odah v. United States*, 127 S.Ct. 1478 (Apr. 2, 2007); *Boumediene v. United States*, 127 S.Ct. 3078 (Jun. 29, 2007); *al Odah v. United States*, 127 S.Ct. 3067 (Jun. 29, 2007). A writ of *certiorari* is an order by a higher court on whether to hear an appeal. If denied, the court refuses to hear the appeal and the judgment of the lower court stands. If granted, the higher court hears and acts upon the appeal. Black's Law Dictionary 1,443 (5th ed. 1979).

¹⁰¹ 501 F.3d 178 (2007) (also providing that that a lawyer offering his or her services, may have up to two visits with a detainee to obtain detainee's authorization to seek review of the CSRT decision of status).

¹⁰² *Gates v. Bismullah*, 2008 WL 478412 (Feb. 22, 2008).

¹⁰³ *Hamdan*, *supra* note 8.

¹⁰⁴ The Supreme Court has acknowledged that "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities." *Hamd*, *supra* note 70, at 2641.

¹⁰⁵ The longest held American POW is Jim Thompson, captured in 1964 by the North Vietnamese and held until 1973. See Philpott, Tom, GLORY DENIED: THE SAGA OF JIM THOMPSON, AMERICA'S LONGEST HELD PRISONER OF WAR (W.W. Norton & Company, 2001).

¹⁰⁶ See Ruth Wedgwood, *Justice Will be Done at Guantanamo*, THE FINANCIAL TIMES OF LONDON, Jul. 15, 2003, *available at* www.usinfo.state.gov/regional/nea/sasia/afghan/text2003/0715gtmo.htm.

¹⁰⁷ U.S. CONST., art. I, § 8.

¹⁰⁸ Thompson, Sir Robert, PEACE IS NOT AT HAND, 45 (New York: David McKay Company, Inc., 1974). See *also* Thompson, Sir Robert, DEFEATING COMMUNIST INSURGENCY: THE LESSONS OF MALAYA AND VIETNAM (New York: Frederick A. Praeger, Publishers, 1966); Thompson, Sir Robert, REVOLUTIONARY WAR IN WORLD STRATEGY, 1945-1969 (New York: Taplinger Publishing, 1970).